# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SEVENTH REGION

CARAVAN KNIGHT FACILITIES MANAGEMENT, LLC

Respondent Employer

and

Case 07-CA-081195

INTERNATIONAL UNION, UNITED AUTOMOBILE. AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, AND ITS LOCAL 1700

Respondent Unions

and

Case 07-CB-082391

ARETHA A. POWELL, an Individual

**Charging Party** 

RESPONDENT'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

# TABLE OF CONTENTS

TABLE OF CON	TENTS	i
	HORITIES	
I. SUM	IMARY OF ARGUMENTS	1
II. ARG	UMENT	2
A.	Cross Exceptions 1 and 2 Concerning Faircloth's Presence During the May 11 Incident and How Walle's Investigation Was Adequate	2
	<ol> <li>Testimony concerning the May 11 Incident</li> <li>Faircloth's Presence on May 11</li> <li>Walle's Investigation</li> </ol>	4
III. CO	ONCLUSION	10

# TABLE OF AUTHORITIES

#### I. SUMMARY OF ARGUMENTS

On April 3, 2013, Administrative Law Judge Michael A. Rosas issued his decision and dismissed the Complaint in this matter in its entirety. On May 31, 2013, Counsel for the Acting General Counsel filed a number of exceptions to the ALJ's Decision. While Respondent will be filing an Answering Brief to Acting General Counsel's Exceptions on or before July 15, 2013 asking that the Board affirm the ALJ Decision and Order, Respondent respectfully cross excepts to two of the findings made by the ALJ because they are erroneous.<sup>1</sup>

Indeed, the ALJ erred in finding that the investigation by Shoun Walle, Respondent Employer's manager, of the May 11, 2012 incident involving Charging Party, Aretha Powell, was flawed. The record evidence clearly establishes that Walle's investigation was not flawed. In this regard, he interviewed all of the eye witnesses to the incident that he learned of during his investigation as well as Charging Party. Collectively, the information he obtained from the witnesses as well as Charging Party during the course of his investigation supported the decision to discharge the Charging Party.

In addition, Respondent cross excepts to the ALJ's finding that Marge Faircloth was not in the room at the time of the incident. The record evidence establishes that Faircloth was in the room at the time of the incident.

<sup>&</sup>lt;sup>1</sup> Associate Executive Secretary Henry S. Breiteneicher granted a partial extension of time to file answering briefs on June 6, 2013.

Although Respondent contends that the ALJ erred in two respects, Respondent still asks that the ALJ Decision and Order be affirmed.<sup>2</sup> In this respect, even if the Board affirms the ALJ's finding that Walle's investigation was flawed and that Faircloth was not in the room, the ALJ Decision and Order should still stand. As will become evident when Respondent files its Answering Brief to Acting General Counsel's Exceptions, even with the above two erroneous findings by the ALJ, the Decision and Order correctly find and conclude that the decision was not in violation of the National Labor Relations Act, 29 U.S.C. § 151 et seq.

#### II. ARGUMENT

A. Cross Exceptions 1 and 2 Concerning Faircloth's Presence During the May 11 Incident and How Walle's Investigation Was Adequate

# 1. Testimony Concerning The May 11 Incident

On May 11, while employees were waiting for the pre-shift meeting to begin, Charging Party, Aretha Powell ("Powell") allegedly threatened Belinda Tanner ("Tanner"), a fellow employee and member of the same union, in the "cage" area. A number of witnesses for Acting General Counsel testified about the incident, including Jackie Keyes ("Keyes"), Patrice Williams ("Williams") and Nate Hudson ("Hudson"). Of course, Powell, Tanner and Marge Faircloth ("Faircloth"), the union steward, testified about the incident and each provided a written statement to Respondent (RE 7-9).

<sup>&</sup>lt;sup>2</sup> Respondent only cross excepts to foreclose any argument that these two issues are not properly preserved for review by the Board or beyond.

Keyes testified she did not hear or could not recall what was said by the various individuals in the area at the time. She was reading her book and doing things with her phone (TR 545, 573-575). But, Keyes was aware that Powell had a dispute with Tanner (TR 568). Williams similarly testified she did not hear the entire conversation (TR 757). In this regard, she only heard Powell say someone will turn it into something else in response to Larry Moore's comment, let him be quiet before somebody turn it over—turn into something else (TR 743). Williams admits she did not hear anything else being said by Powell, but heard Tanner say, "that ain't gonna happen" (TR 744).

Hudson testified he was not paying attention to the conversations in the area and that others were talking (TR 782, 793). He testified that he did not hear anything being said between Powell and Tanner, but recalls Tanner talking about people stealing "shit" (TR 782, 783).

Powell testified that the extent of the conversation is that she told Larry Moore that "I'm grown and still haven't got my ass whooped, but those who laugh least laugh last" and that Tanner replied, "that aint gonna happen; that ain't gonna happen (TR 315-316, 470, 474-475).<sup>3</sup> She admits Tanner interrupted her, that she did not want Tanner in her conversation and that she looked up at Tanner because she was confused by what Tanner was saying (TR 474, 475, 480). Powell also testified that when she got up, she touched Nate on the back and said, "That's a man. Now that's a man" (TR 473).

<sup>&</sup>lt;sup>3</sup> "That aint gonna happen; that ain't gonna happen" is not responsive to the alleged comments by Powell and suggests strongly that something else was stated.

Tanner testified that Powell threatened her by saying, "I see I'mma have to tear off into your motherfucking ass" (TR 1137). Tanner says Powell's threat followed a string of comments by Keyes, Powell and herself, but denies that she taunted Powell (TR 1137, 1142). Tanner described the sequence as a comment by Keyes, a comment by Powell, a comment by herself ("that's right") followed by the threat (1150-1151).

#### 2. Faircloth's Presence On May 11

The ALJ found that Faircloth was not present in the room at the time based upon the testimony of Nate Hudson. However, Tanner places Faircloth at the tables when the incident occurred (1136). Also, Faircloth testified that she was in the "cage" area at the tables when the exchange occurred (TR 1061-1062, 1064). She said that Powell made a comment to Keyes, "you need to watch what you say...people like to repeat what you say (TR 1065). According to Faircloth, Tanner said, "I sure do" and Powell looked at her and said, "Looks like I'm going to have to rip into a motherfucker" or "tear into a motherfucker's ass (TR 1066). Faircloth says this upset Tanner (TR 1066-1077).

Tanner testified that immediately following the incident, Tanner took Faircloth aside and discussed what happened (TR 1067, 1138). Tanner told Faircloth she was sick of being threatened (TR 1067). Faircloth advised Tanner she had options: she could report the issue, make a statement or speak to LeVaughn Davis ("Davis") (TR 1067).<sup>4</sup> Tanner asked to speak to her chairperson, so Faircloth brought her to Davis (TR 1067-1068, 1138-1139). Both Tanner and Faircloth told Davis what occurred (TR 927-928, 934-935). Both Tanner and

<sup>&</sup>lt;sup>4</sup> Davis is the Union Chairperson at the site.

Faircloth wrote out statements that morning in the union trailer (RE 8, RE 9, TR 1068-1069, 1140).

About a month after Powell's discharge, Hudson approached Walle and advised him that the NLRB had asked him to make a written statement about the incident (TR 114, 786, 797). According to Hudson, Walle responded by asking him if he would write one out for him too (TR 786). Walle received Hudson's statement on or about July 11 (TR 131). Hudson was the only employee who says there was conversation about how "motherfuckers like to steal shit" (TR 171). Walle also noted that the statement was considerably after-the-fact and that Hudson had previously been discredited as supervisor and demoted with a paycut (TR 171-172). Significantly, Hudson was not identified in Powell's written statement (RE 7, TR 172).

Significantly, Hudson testified that he left the area before all the others and passed Faircloth in the doorway as she was entering the "cage" area (TR 785, 795). Hudson is the only witness who said Tanner was talking about people stealing "shit". Hudson also testified he heard Powell say, "I'm grown and I still haven't got my ass whooped" but did not include this in his statement to the NLRB or to Respondent Employer (TR 807). Of course, Hudson's different recollection of what occurred is actually explained by the fact that he and Faircloth admittedly passed in the entrance-way to the room where the incident occurred and gives credence to Faircloth and Tanner's testimony that Faircloth was actually in the room. In this regard, the evidence demonstrates that Hudson left the room before the incident.

# 3. Walle's Investigation

The ALJ found that Walle's Investigation was flawed. However, the record evidence establishes that Walle conducted a reasonably thorough investigation and obtained information that suggested to him that a threat had been made. In this regard, Walle was first contacted by Chairperson Davis who explained what he had learned from Tanner and Faircloth and how Tanner had complained of being threatened by Powell (TR 928-929). According to Davis, Walle wanted to know if Tanner had been instructed to stay away from Powell. After Davis told Walle he had instructed Tanner to stay away from Powell, Walle said he would come over after a meeting he had to attend and he would text Davis when he was ready to investigate (TR 929). Walle contacted Davis later that morning and told him he was ready to investigate (TR 930, 989).

The record evidence shows that Walle and Davis met with Tanner and Faircloth that morning, and both explained what happened (112, 930, 931, 1139, 1069). Tanner advised Walle she wished to pursue the matter (TR 112-113). Walle asked them whether they wished to make statements, and both did (TR 112). Tanner and Faircloth advised Walle that there had been other incidents with Powell (TR 162, 992). According to Walle, he was advised during the meeting that Powell had previously threatened both Faircloth and Tanner and had physically struck a male co-worker, Longmire (TR 162). Davis reported the Longmire incident to Walle as well (TR 922). Walle received written statements from Tanner and Faircloth (TR 113, 1068-1069, 1140, RE 8, RE 9). The record

<sup>&</sup>lt;sup>5</sup> Although Powell had not been written up in the past for making threats and there was nothing documented in her personnel file which was reviewed during the Company's investigation, it is uncontroverted that Walle had been made aware of prior threats and of a physical altercation (TR 110).

evidence establishes that Walle and Davis then spoke to several employees before lunch to see if there were any witnesses (TR 173, 938, 941, 992). Walle testified that he spoke to the employees who had been identified in the written statements (TR 174). The employees that were interviewed essentially said they saw and heard nothing (115, 116, 118, 174, 185, 217, 939, 940, 991). Walle testified that they also interviewed Eddie Bullard, while Davis testified they interviewed Hudson (TR 116, 118, 940).6 Keyes confirmed that she was spoken to by Walle and Davis that morning (TR 547). According to Walle, the employees did not corroborate Powell's statement and none of the employees wanted to provide a written statement (TR 160, 186). Walle specifically denied Acting General Counsel's suggestion that these employees told him Powell did not threaten Tanner (TR 116).

Walle testified he spoke to Powell after lunch in the paint shop office in the presence of Davis (TR 187). According to Walle, he asked her if she had been in an altercation with Tanner and Powell said yes and that she would provide a statement (TR 187). According to Davis, he spoke to Powell on May 11 as well (TR 1016-1017). Powell testified that she went to the paint office and Walle and Davis were there (TR 321). Admittedly, she asked, "What did I do now?" and when Davis said there had been a threat, Powell immediately responded, "Who? Balinda?" (TR 321-322, 373, 479). Powell also admitted that Tanner had gotten into her conversation (TR 480).

<sup>&</sup>lt;sup>6</sup> Given Walle's testimony that he interviewed the employees identified in the written statements, it seems more likely that Bullard was the third witness interviewed. Moreover, Hudson denies being interviewed until well after the fact (TR 785). Quite frankly, it seems that Davis is confusing the two rounds of interviews as Keyes, Moore and Hudson were interviewed again long after Powell's discharge in the presence of Davis (TR 967).

The record evidence establishes that Walle contacted Ruth Ann Little, the Human Resources Director for Respondent Employer CKFM, on May 11 (TR 31, 154-155, 858). Little testified Walle discussed the incident with her and was in the process of obtaining witness statements from those in close proximity (TR 51, 858). Walle testified he told Little what he had so far with witness statements during the first conversation and that he sent her some of the documents he had received (TR 155). According to Little, Walle was going to continue to gather information and get back with her (TR 859).

Walle testified that he obtained Powell's written statement of the incident on May 12 and sent it to Little the same day (TR 155-156). According to Walle, he and Little spoke again on May 12 (TR 860). Little recalls discussing the prospect of suspending Powell on May 12 after receiving Powell's written statement (TR 860). According to Little, after receiving Powell's written statement, Walle asked about suspending her and Little approved it (TR 860). Powell was then suspended pending the outcome of the investigation on May 12 (GC 8/RU 7, 108). Powell refused to sign or offer her disagreement (*Id*, TR 327). Davis was present when Powell wrote "RFT" on the suspension notice (TR 949). According to Davis, Walle told Powell he believed she had been the aggressor (TR 951).

Powell was discharged on May 16 for violation of the Major Work Rule P ("Threatening, intimidating, or coercing employees...") (RE 6q, RE 3). According to Walle, he and Little discussed the statements, and he advised Little he thought the Tanner and Faircloth statements outweighed Powell's statement (TR 156). Walle told Little he believed a threat had been made and that he believed Tanner and Faircloth based on his working relationship with them and how neither had

ever given him reason not to believe them (TR 162, 860-861). Little's testimony is in accord:

[Q] Okay. Was there discussion about moving Powell to discharge?

[A] Not in that first initial discussion, but eventually yes, I think later that day we had a second discussion, but sometime during – after we finished looking at all the statements, he did discuss the possibility of moving her case to a discharge.

[Q] And did you approve of that?

[A] Ultimately I did, yes.

[Q] Why? Why is that?

[A] Specifically, I asked Shoun if after interviewing all the people involved and in what they heard and what they saw, did he believe that a threat actually took place. And he did believe that to be true.

[Q] Okay.

[A] That weighed very heavily in my decision because Shoun has worked with all these individuals for quite some time. He believed that she had been threatened.

(TR 860-861). Walle prepared the discharge notice and sent it to Little for her approval (TR 158, RE 6q). According to Little, she and Walle were in agreement on discharging Powell (TR 51, 861, 876, 881).

There is simply no evidence that Walle was aware of any witness who could corroborate Powell's written statement at the time of the discharge decision. Walle testified that he did not learn of any other witness during his investigation or the subsequent grievance process (TR 161, 169). Indeed, both Hudson and Williams testified they did not come forward at the time of the incident (TR 758, 798). Walle's testimony that he would have interviewed others had he known of them stands unrebutted on the record (TR 164). This testimony is substantially corroborated by the testimony that Davis told Powell during the

grievance process that "none of your co-workers had your back. None of them came to your rescue" (TR 333, 512).<sup>7</sup>

#### III. CONCLUSION

For the reasons advanced above, Respondent, Caravan Knight Facilities Management, Inc., respectfully asks that its Cross Exceptions be sustained and the Administrative Law Judge's Decision and Order upheld.

Respectfully submitted this  $14^{th}$  day of June, 2013.

Dated: June 14, 2013

PILCHAK & COHE

By: LIMIC (P41735)

3062 E. Walton Blvd. Auburn Hills, MI 48326

(248) 409-1900

Powell and Davis only disagree over whether Powell then responded, "I got something for those motherfuckers" (TR 512, 994).

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SEVENTH REGION

CARAVAN KNIGHT FACILITIES MANAGEMENT, LLC

Respondent Employer

and

Case 07-CA-081195

INTERNATIONAL UNION, UNITED AUTOMOBILE. AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO, AND ITS LOCAL 1700

Respondent Unions

and

Case 07-CB-082391

ARETHA A. POWELL, an Individual

**Charging Party** 

### **PROOF OF SERVICE**

I certify that on June 14, 2013, I served a copy of RESPONDENT CARAVAN KNIGHT FACILITIES MANAGEMENT, INC.'S CROSS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION and RESPONDENT'S BRIEF IN SUPPORT OF CROSS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE on:

Michael A. Rosas

Administrative Law Judge

Email: Michael.Rosas@nlrb.gov

Darcie Brault, Esq.

Email: brault@michworklaw.com

Robert Drzyzga, Esq.

Email: Robert.Drzyzga@nlrb.gov

And this **Proof of Service** via email on the above names and electronically with the National Labor Relations Board efiling system. I declare that the statements above are true to the best of my information, knowledge and belief..

Dated: June 14, 2013

Dawn M. Burke